

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
CASE NO. 07-80475-CIV-GOLD/TURNOFF

In re:

ABRAHAM DAVID GOSMAN,

Debtor.

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JOSEPH J. LUZINSKI, CHAPTER 7 TRUSTEE  
FOR THE ESTATE OF ABRAHAM D. GOSMAN,

Appellant,

v.

PEABODY & ARNOLD LLP and JOEL  
REINSTEIN, P.A.,

Appellees.

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ORDER AFFIRMING BANKRUPTCY COURT'S ORDER; DISMISSING APPEAL ; *Re closing case*

THIS CAUSE comes before the Court on Appellant Luzinski's appeal of the Bankruptcy Court's Order (the "Order") dated March 9, 2007 granting Appellee Peabody & Arnold's ("Peabody") Motion for Reconsideration and Dismissing Counts I, III, and IV of the Second Amended Complaint. As explained in more detail below, Trustee Luzinski appeals the Bankruptcy Court's dismissal of Count I based on the in pari delicto doctrine. Because the other Counts were dismissed on alternative grounds that were not appealed, the only Count at issue on this appeal is Count I of the Second Amended Complaint.

I. Background and Order on Appeal

The Order on appeal here resulted in the dismissal of an adversary proceeding, Adv. No. 03-3228-BKC-AHF-A, against the law firm of Peabody & Arnold brought by the

Trustee in connection with the bankruptcy case of Mr. Gosman, Case No. 01-30953-BKC-SHF. Specifically, the Order on appeal dismissed the Trustee's claims for professional malpractice against Peabody & Arnold (Count I), conspiracy to defraud creditors against Peabody & Arnold (Count III), and conspiracy to commit fraudulent asset conversion (Count IV). The Trustee brought those claims to recover damages on behalf of Mr. Gosman's estate in connection with Peabody's allegedly negligent acts and omissions in the legal services provided by Peabody to Mr. Gosman. As explained in the Order on appeal,

On October 10, 1999, Mr. and Ms. Gosman executed an amendment to their antenuptial agreement whereby Mr. Gosman conveyed a one-half fee interest in the real property located at 513 North Country Road, Palm Beach, Florida, together with a one-half interest in the artwork and furnishings located upon the referenced premises, to Mr. and Ms. Gosman as tenants by the entirety. Additionally, \$2 million in cash was transferred to Ms. Gosman. The amendment stated that the transfers were in consideration for Ms. Gosman's waiver of her right to pursue remedies resulting from Mr. Gosman's alleged default under their original antenuptial agreement. The amendment was prepared by Reinstein and Vigoda [a former partner of Peabody]. On March 2, 2001, Mr. Gosman filed a voluntary petition under Chapter 11. On June 25, 2002, Mr. Gosman converted the case to a Chapter 7 proceeding. On July 1, 2002, Joseph J. Luzinski was appointed chapter 7 trustee for Mr. Gosman.

Order at 2-3.

Bankruptcy Judge Friedman dismissed Counts I, III and IV under the doctrine of *in pari delicto*, based on a Bankruptcy Court order in a separate adversary proceeding which found that the Debtor, Mr. Gosman, acted with intent to defraud creditors when transfers were made between Mr. Gosman and Ms. Gosman. Order at 4 (citing March 1, 2005 Order by Judge Lessen in *Luzinski v. Gosman*, No. 02-3155 BKC-SHF-A).

A. The Trustee's adversary proceeding against Mr. and Mrs. Gosman<sup>1</sup>

This separate adversary proceeding, Adv. No. 02-3155, was brought by the Trustee, Joseph J. Luzinski, against Mr. and Mrs. Gosman in Bankruptcy Court within the context of the same underlying bankruptcy case of Mr. Gosman. In adversary proceeding 02-3155, the Trustee objected to exemptions claimed by the Debtor, Mr. Gosman, and sought to have the Debtor's transfers voided as fraudulent transfers. In the Third Amended Complaint for that proceeding, the Trustee makes the following allegations:

(1) "In truth, the alleged events of default [of the Antenuptial Agreement] were a sham, along with the purported ongoing negotiations between Gosman and Castre Gosman, all of which were intended to create the illusion that Gosman and Castre-Gosman were engaged in arm's length negotiations regarding an amendment to the 1996 Antenuptial Agreement when, in fact, they were engaging in a pre-mediated, concerted effort to hinder, delay or defraud creditors by shielding Gosman's assets from the reach of third party creditors." Third Am. Compl. ¶ 59.

(2) "With the foregoing financially devastating events as the backdrop, Gosman, with the active participation and assistance of lawyers and other professionals that are not parties to this action, began engaging in systematic and significant 'estate planning' transfers. Although these questionable transfers are now being characterized by the Debtor and Castre-Gosman as arm's length negotiations with the purpose of amending the 1996 Antenuptial Agreement, the true purpose of these transactions was much more sinister and self-serving—to remove otherwise non-exempt assets from the reach of non-insider, third party creditors, and to 'park' such assets

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I consider the Third Amended Complaint and the Opinion dated March 1, 2005 in the separate adversary proceeding brought by the Trustee against Mr. And Mrs. Gosman for the purposes of collateral estoppel, judicial admissions, and judicial estoppel, as discussed further in this Order. See *Cohen v. Bucci*, 905 F.2d 1111, 1112 (7th Cir. 1990) ("Adversary proceedings in bankruptcy are not distinct pieces of litigation; they are components of a single bankruptcy case.") The Third Amended Complaint and the Order dated March 1, 2005 are part of the record on appeal in this instant case, and to the extent necessary, I also take judicial notice of these documents as matters of public record. See *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1280 (11th Cir. 1999).

with Castre-Gosman under the cloak and purported safe harbor of tenants by the entireties property, which property is listed in Schedule "C" of the Debtor's bankruptcy schedules." Third Am. Compl. ¶ 69.

(3) "Further, in a letter dated July 29, 1999, one day prior to the North County Road Transfer, Gosman notified the trustee for the Marital Trust, Robert Vigoda, to transfer all shares held in trust to Gosman. The July 29<sup>th</sup> letter was sent to attempt to 'paper the file' by fabricating an event of default under the 1996 Antenuptial Agreement because, prior to July 29<sup>th</sup>, no default existed." Third Am. Compl. ¶ 73.

(4) "Even more troubling, however, is that Gosman's counsel never independently inquired or investigated whether there were in fact any events of default under the 1996 Antenuptial Agreement. These are not the actions of an attorney that is zealously representing the interests of this client and, based upon the limited scope of the representation as conveyed by Gosman, this approach was clearly endorsed by and done with the approval of Gosman." Third Am. Compl. ¶ 77(a).

(5) "Although multi-millions of dollars in assets were at stake (the lion's share of which were owned by Gosman), the 1999 Antenuptial Amendment was drafted solely by Castre-Gosman's counsel and was not presented to Gosman's counsel for his review until *after* all of the material terms of the agreement had already been negotiated and written up between the parties. At best, Gosman's counsel was no more than a 'rubber stamp' for a deal that had already been negotiated and drafted, which are not the actions of someone whose client is truly engaged in an arm's length negotiation." Third Am. Compl. ¶ 77(b) (emphasis in original).

(6) "According to Gosman's counsel, Gosman expressly limited the scope of the attorney's representation in reviewing the proposed 1999 Antenuptial Amendment, although this limitation was not documented in any memorandum by the attorney to the file or confirming letter to the client. Again, these are not the actions of someone whose client truly wants his rights and interests to be preserved in a contested negotiation." Third Am. Compl. ¶ 77(c).

(7) "Thus, as evidenced by the above acts and omissions, among others, the purported 'settlement' of Castre-Gosman's allegations of default regarding the 1996 Antenuptial Agreement was no more than an orchestrated sham by Gosman, Castre-Gosman, and their respective counsel so as to enable non-exempt assets to be transferred to allegedly exempt status, outside the reach of creditors." Third Am. Compl. ¶ 78.

(8) "Thus, the Debtor, while insolvent and/or facing the existing or imminent

collapse of his financial empire, through the Artwork Transfer and the North County Road Property Transfer, decided to shelter his most valuable and prized assets (valued, on paper, at over \$50 million) from his non-insider third party creditors by transferring such assets to a woman he believed to be his wife of three years in exchange for her agreement not to sue him under a contingent obligation of, at best, no greater than \$5 million." Third Am. Compl. ¶ 81.

(9) "The Debtor made the North County Road Property Transfer to Castre-Gosman with the actual intent to hinder, delay or defraud a creditor of the Debtor, including Chase." Third Am. Compl. ¶ 102.

(10) "The Debtor made the Artwork Transfers to Castre-Gosman with the actual intent to hinder, delay or defraud a creditor of the Debtor, including Chase." Third Am. Compl. ¶ 112.

(11) "The Blossom Transfer was made with actual intent to hinder, delay or defraud a creditor of the Debtor." Third Am. Compl. ¶ 124.

(12) "The Debtor made the Bank Account Transfers to Castre-Gosman with the actual intent to hinder, delay or defraud a creditor of the Debtor" Third Am. Compl. ¶ 135.

(13) "The Debtor made the Prepetition Money Market Transfer to Castre-Gosman with the actual intent to hinder, delay or defraud a creditor of the Debtor." Third Am. Compl. ¶ 146.

Following a trial in the above adversary proceeding brought by the Trustee against the Gosmans, Bankruptcy Judge Lessen voided the transfers under 11 U.S.C. 548, 11 U.S.C. 544(b)(1) and Section 726.105(1) of the Florida Statutes.<sup>2</sup>

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The relevant part of 11 U.S.C. § 548(a)(1) provides:

(a)(1) The trustee may avoid any transfer of an interest of the debtor in property, of any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily -

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or become, on or after the date that such transfer was incurred, indebted; or ... (emphasis added).

The relevant part of 11 U.S.C. § 544(b) provides:

(b)(1) Except as provides in paragraph (2), the trustee may avoid any transfer of an



Judge Lessen determined that Mr. Gosman, the Debtor, made the transfers with actual intent to hinder, delay or defraud creditors under both Federal and Florida law. 11 U.S.C. § 548(a)(1)(A); Fla. Stat. § 726.105(1). Specifically, the Lessen Order states the following:

Applying the badges of fraud to the facts in this proceeding, the Court finds that the transfers at issue were made with actual intent to hinder, delay, or defraud creditors.

Lessen Order at 31.

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interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

In applying 11 U.S.C. § 544(b), the Bankruptcy Court held that “[i]n order to take advantage of Section § 544(b), the trustee must demonstrate (i) the existence of an actual creditor; (ii) with an allowable claim; (iii) who, under non-bankruptcy law, could avoid all or part of the transfer.” Lessen Order at 28 (citing *In re Scott Wetzel Servs., Inc.*, 293 B.R. 791, 794 (Bankr. M.D. Fla. 2003)). According to the Lessen Order, the applicable non-bankruptcy law referenced above includes the Florida statute on fraudulent transfers, Section 726.105(1) of the Florida Statutes. Judge Lessen further explained that the Florida statute has similar elements to the federal statute on fraudulent transfers, 11 U.S.C. § 548, but the Florida statute is not limited to transfers which take place within one year of the date of filing of the petition. Lessen Order at 28-29. Section 726.105(1) of the Florida Statutes provides:

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or . .  
(emphasis added)